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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 282.

DISTRICT OF COLUMBIA

vs.

R. P. ANDREWS PAPER CO., A CORPORATION.

No. 283.

DISTRICT OF COLUMBIA

vs.

SAKS & COMPANY, A CORPORATION.

No. 284.

DISTRICT OF COLUMBIA

vs.

ABRAHAM LISNER.

BRIEF FOR RESPONDENTS.

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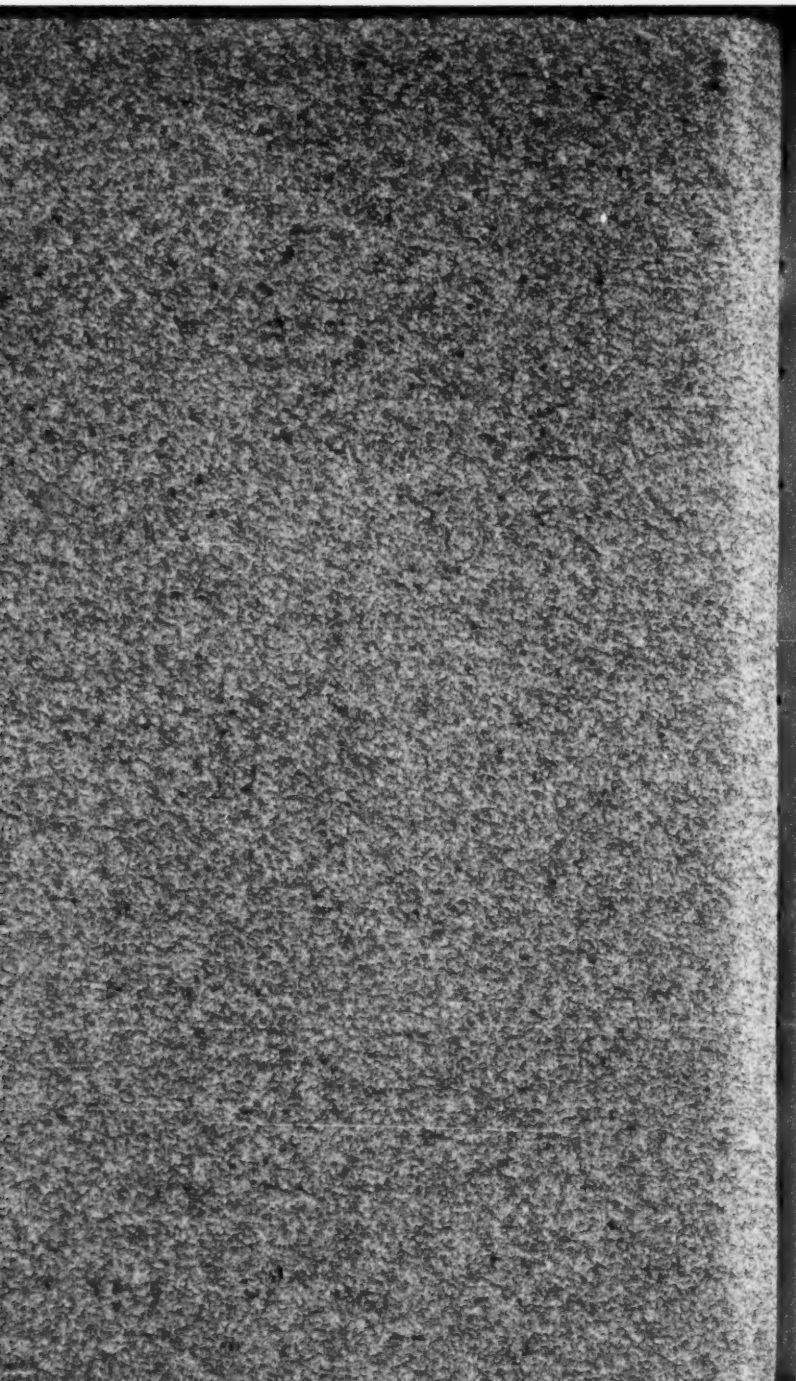

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BRIEF FOR RESPONDENTS.

Statement of the Case.

These cases are in this court on writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia in each case, reversing a judgment of the Su-

preme Court of the District rendered therein in favor of the District of Columbia in suits by the latter to recover rent from each of the respondents for the use of vault space beneath the sidewalk adjacent to the several buildings occupied by them.

The facts are substantially as follows:

Saks & Company, respondents in No. 283, being long-term tenants of premises situated at 7th street and Market Space, in the city of Washington, constructed vaults beneath the sidewalk in front of the leased premises under a permit from the District of Columbia dated September 25, 1884 (Rec. No. 283, p. 11). The building regulations of the District then in force prescribed as a fee for a permit to construct such a vault the sum of two dollars ($2.00) per lineal foot thereof, which in this instance amounted to eighty-seven dollars ($87.00).

The Andrews Paper Company, respondent in No. 282, is a tenant of premises Nos. 727-731 Thirteenth street northwest, formerly owned by one James Sharp, who built the vault used by this respondent. The permit for the construction of this vault was issued to Sharp July 30, 1912. At that date the building regulations prescribed one dollar ($1.00) as the permit fee, and by paragraph 9 provided that "no charge will be made for the occupancy of public space by vaults or areas except the usual permit fee," and further that "all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation when the vault space *is needed for public use or improvements.*"

Other important conditions were embodied in these regulations which will be considered in the argument, among them being the requirement that the pavement over the vault

should be constructed at the expense or risk of the owner of the abutting property, and that upon change of grade the vault must be changed and repaved accordingly at the expense of the *owner* of the abutting property.

Abraham Lisner, respondent in No. 284, owns the premises occupied by him, situated corner of 11th and G streets northwest, and under a permit dated January 9, 1914, constructed the vault, which he now uses, beneath the sidewalk adjacent to his premises. The building regulations in force when this vault was built were the same as in 1912, to which reference has been made.

The first building regulations for the city of Washington were promulgated in 1791 by George Washington, then President of the United States, and these prohibited the construction of vaults without a permit. From that time until September 1, 1916, a period of one hundred and twenty-five years, during which there was a continuity of building regulations for the District, embodying many changes applicable to the growth and varying conditions of the city, no charge was ever made for the use or occupancy of vault space beneath the sidewalk other than the fees prescribed at different times and varying in amounts for the issuance of permits to construct such vaults.

Congress, by an act approved September 1, 1916, which was an appropriation act for the fiscal year ending June 30, 1917, provided in section seven thereof:

> "That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

Pursuant to this act, the District Commissioners on October 16, 1916, promulgated an order providing for the method of ascertaining the amount of rentals to be charged and the date on which they should be paid. The latter was by an amendment to this order, dated October 20, 1916, fixed as July 1 of each year, and the amount charged was payable within thirty (30) days after presentation of the bill therefor.

Under the provisions of these orders, each of the respondents was charged an annual rental for the use of the respective vaults referred to and, for reasons hereinafter set forth, each refused to pay this rental. Thereupon the District brought an action in assumpsit against each to recover the rent charged.

The cases were tried together on agreed statements of facts and the Supreme Court of the District rendered judgment in each case in favor of the District for the amount sued for. The agreed statements include what has been already above set forth, and embody the various applicable building regulations in force from 1791 to September 1, 1916, the orders of the District Commissioners above referred to, the permits for the construction of the vaults involved, and as a part thereof the *contractual* conditions under which these permits were issued and accepted. It is also stipulated that the act of Congress authorizing and directing the assessment and collection of rent for vault space and the orders of the District Commissioners made pursuant thereto, affect

> *a*. The owner of premises adjoining the vault who is the user of the vault and built the same for which rent is charged in this case. The vault was con-

structed pursuant to a permit, a copy of which is attached hereto and made part hereof.

b. The tenant of premises adjoining the vault for which rent is charged who is the user of the vault, and constructed the same at his own expense, pursuant to a permit, a copy of which is attached hereto and made a part hereof.

c. The tenant of the premises adjoining the vault for which rent is charged who is the user of it; but did not construct the same; but the same was constructed by the owner under a permit from the District, a copy of which is filed herewith (Rec. 282, p. 10).

The respondents severally appealed to the Court of Appeals of the District from the judgments rendered against them, and that court reversed the judgments, holding in substance that in view of the expressed conditions under which the vaults were constructed and used, one of which was that no charge would be made for use of the space occupied, it must be assumed that Congress, in enacting the rent provision in question, must have intended to preserve vested interests by an act in no sense a police measure, but the sole purpose of which was to provide revenue, and that therefore the act applies only to permits thereafter issued (Rec. 282, pp. 22, 23).

To review the judgments of the Court of Appeals, the cases have been brought before this court by writs of certiorari.

ARGUMENT.

I.

The vaults in question were constructed under permits issued by the District of Columbia, containing conditions and stipulations accepted by the permittees, which, together with the building regulations applicable thereto, formed contracts under which the respondents acquired vested property rights subject to impairment or revocation only by the exercise of the police power of the District for public needs.

Vaults were built in the District of Columbia under acts of Congress and building regulations, between October 17, 1791 and June 26, 1891, when the Commissioners promulgated certain other provisions or regulations which as subsequently amended, were in existence at the time two of the vaults in question were constructed and are in part as follows:

On October 23, 1891, the Commissioners adopted a—

> "schedule of limitations and provisions relative to the projection of portions of buildings beyond the building line, as a basis for the Commissioners' concurrence under the act of March 3, 1891."

In this schedule was the following provision:

> "The area occupied shall be paid for at the rate of fifteen cents per cubic foot. Pavements over vaults *must be constructed at the expense or risk of owner or owners of abutting property.*"

On July 25, 1892, it was ordered—

> "that the paragraph relating to the rate to be paid for the occupation of vaults, in the schedule of limitations and provisions relative to the projection of portions of the buildings beyond the building line, as set forth in the Building Regulations of the District of Columbia, is hereby amended to read as follows: 'The area occupied shall be paid for at the rate of fifteen cents per cubic foot in front of business houses and ten cents per cubic foot in front of dwellings. Pavements over vaults must be constructed at the expense or risk of the owner of abutting property'" (Rec. 282, p. 5).

In the building regulations adopted December 1, 1892, in section nine (9), under the caption "Vaults under pavements," is the following:

> "Vaults in front of business property, the area shall be charged at the rate of fifteen cents per cubic foot, and in front of dwellings at the rate of ten cents per cubic foot, nor shall permit be issued until plan is submitted and approved, showing openings. Pavements over vaults must be constructed at the expense or risk of owner or owners of abutting property."

Section eight (8) fixes a fee for vaults as follows:

> "For each permit for vault, fifteen cents per cubic foot of proposed vault in front of business property, and ten cents per cubic foot in front of dwellings."

The building regulations adopted July 31, 1897, contained the following provision:

"No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation. No permit for vault or area shall be issued until there is submitted and approved plans showing the location and dimensions of the vault or area, and all openings pertaining thereto."

On February 20, 1900, the Commissioners passed the following order, defining the conditions under which permits for vaults would be issued:

"Ordered: This permit is accepted on condition that the District of Columbia has the right at any time to construct under, over or through said vault space, water pipes, gas pipes, sewers, conduits or other pipes of underground construction that the Commissioners of said District may deem necessary to be placed in the space occupied by the vault, without compensation.

And it is further agreed that in accepting this permit that the owner or owners, their heirs, executors, administrators, or assigns, immediately upon notice from the Commissioners of the District of Columbia that the water pipes, gas pipes, sewers, conduits or other pipes, or underground construction are to be introduced in the space occupied by the vault, shall commence to move and forthwith remove, if necessary, any boiler, pipe, wall beam, machinery or construction in or pertaining to said vault, or any fixture or other thing therein, without cost to said District, so as to leave a space clear and sufficient in the judgment of said Commissioners for the introduction and maintenance of any underground con-

struction from time to time deemed necessary by said Commissioners. And said Commissioners reserve the right to enter upon the premises at any time for the inspection and proper maintenance or repair of any work constructed by the District. In case the street roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid" (Rec. 282, p. 6).

The building regulations adopted on February 27, 1902, contained the following, among others (sec. 123):

"Par. 2. Plans must be submitted, with an application on an official blank, showing the location and dimensions of the vault and all openings, also the depth and proposed construction; and the vault must be built in accordance with the approved plans.

"Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of section 124, contracting to release and relinquish the vault space, and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners, or needed for public uses."

Also:

> "Whenever the grade is changed, the vault must be changed and repaved, at the expense of the owner of abutting property, to comply with the new grades."

* * * * * * *

No Charge for Occupation of Space.

> "Par. 9. No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation, *when the vault space is needed for public use or improvements.*"
>
> "No vaults shall be constructed so as to interfere with any sewer, water pipe, manhole, gas pipe, tree, or other public work or improvement, nor with any electric conduit carrying fire-alarm or police wires" (Rec. 282, p. 7).

The building regulations adopted October 18, 1909, contained the following (sec. 123*a*):

> "Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of section 124, contracting to release and relinquish the vault space, and to remove free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners or needed for public uses."

No charges for vaults were made, except $1.00 for permit to construct the vault. The permit issued was similar to the

one provided for in the order of February 20, 1900, before quoted. The building regulations adopted January 18, 1913, in force on September 1, 1916, contained various provisions relative to the construction of vaults, but made no charge therefor, except the usual permit fee of $1.00. Sections 123*a* and 124.

The permit issued was the same, with the following addition, which also appears in the revisions of 1902 and 1909:

> "And I herewith submit a statement of the proposed and intended uses of the vault, and a list of all machinery and fixtures that will be placed therein, subject to the limitations of section 123, and I further agree to use the vault for the purposes authorized by the Commissioners and for no other purposes, under the terms of this section and agreement, and subject to the penalties for non-compliance as provided in section 182 of the Building Regulations for the District of Columbia.
>
> ——— ———,
> ——— ———,
> ——— ———,
> *"Owners of Abutting Property."*

(Rec. 282, p. 8.)

From the foregoing, the express contract between the District and an applicant for a permit to build a vault, existing when the vaults used by the respondents Andrews Paper Company and Lisner were constructed, may thus be stated:

In consideration of the payment of the sum of one dollar by the applicant concerned and the further agreement on his part—

(*a*) to construct the pavement over the vault at the expense and risk of the *owner* of the abutting property;

(*b*) to accept the permit on condition that the District has the right to construct in, through, etc., the vault space such water pipes, conduits, and other public construction as may be deemed necessary by the Commissioners;

(*c*) that the owner, his heirs, administrators, or *assigns*, upon notice from the Commissioners that the construction mentioned in (*b*) is to be introduced into the vault space, shall move and forthwith remove, if necessary, any boiler, machinery, or other fixture or thing therein, for the purpose of such construction and the maintenance thereof;

(*d*) to change the vault without expense to the District to correspond to any widening of the street, roadway, or sidewalk;

(*e*) to change the vault to correspond to any change of grade and repave, this to be done at the expense of the *owner* of the abutting property;

(*f*) to so construct the vault as not to interfere with any sewer, water pipe, tree, or other public work or improvement;

(*g*) to sign a "written *agreement* * * * *contracting* to release and relinquish the vault space and *remove free of expense* to the District" all fixtures or "structural parts of the vault when so ordered by the Commissioners or needed for public uses;"

(*h*) to accept the permit subject to revocation by the Commissioners at any time *without compensation* "when the vault space is needed for public use or improvements;"

(*i*) to accept the permit with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises, "and that no right, title, or interest of the public is in any way waived or abridged thereby, *except as expressed in said permit and the conditions aforesaid;*"

(*j*) to use the vault only for the purposes authorized by the Commissioners, subject to penalties for non-compliance of such agreement—

the District agreed to permit the applicant, his heirs, administrators, or assigns, to use and occupy the vault space *without charge* for the use and occupancy thereof until such time as the particular space should be needed for public use or improvements.

This is the contract under which the vaults used by the respondents Andrews Paper Company and Lisner were constructed.

The respondent Saks & Company, in 1884, paid $87 as the fixed charge and compensation for the privilege of erecting and occupying the vault space used by it, and all the rights of the District with respect to revocation, entry, and subjection to the paramount needs of the public were necessarily implied in so far as this vault is concerned. For thirty-two (32) years no rental was ever charged, and between 1897 and 1916 the District, in its legally authorized building regulations, publicly announced that no such charge would be made. Free occupancy in this instance may, therefore, by the acts of the parties, in addition to the payment of the sum of $87.00, be assumed as having been understood to be a part of the contract with Saks & Company.

(a) *The erection of the vaults at the cost of the owner, and the privilege of the use and occupancy thereof pursuant to and in compliance with the expressed terms of the permit and contract above set forth constitute a vested property right.*

> "A vault constructed under a permit from the municipality is in itself a species of property; * * *."
>
> Vol. 3, Dillon on Municipal Corporations, sec. 1180, page 1873.

A vault under the sidewalk constructed with the permission of the city authorities by the owner of the abutting building, is an easement appurtenant to the abutting owner's premises and is in itself a species of property which the owner may protect as fully as any other property.

Parish *vs.* Baird, 160 N. Y., 302, 306.

New York Steam Company *vs.* Foundation Company, 195 N. Y., 43, 51, 52.

In Gregsten *vs.* Chicago, 145 Ill., 451, the court held that:

> "A city under special legislative authority, as well as its general powers, may grant permits for and regulate the building of vaults under the streets, alleys and sidewalks, and require such compensation for the privilege as it may deem reasonable and just, when such permits relate solely to such use of the alleys, etc., as is in nowise inconsistent with their use by the public; and such permit when accepted and acted on by the holder by making costly improvements required, will constitute a contract between the city and such holder irrevocable at the mere will of the city" (Syl.).

(b) This property right becomes vested and irrevocable unless its use is denied by the municipality in the exercise of its police power.

In the case of Hot Springs Electric Light Company *vs.* Hot Springs, 70 Ark., 300, 304, 305, an electric light company having erected a plant pursuant to a city ordinance, it was thereafter sought by the city council by a subsequent ordinance to require the company to pay annually the sum of fifty cents for every pole that had been erected pursuant to the original ordinance, which, in all respects, had been complied with by the company. The court in denying the city council the right to collect such additional charge remarked:

> "But cities are as much bound by their lawful contracts as private persons, and it follows from the same reasons that, the city having granted to this company the privilege of erecting and maintaining its poles along the city streets for a period of twenty years, and the grant having been accepted by the company, and the company having expended large sums of money and made valuable improvements on the faith of such grant, the city council cannot now impose additional burdens, and, in effect, change the contract without the consent of the company. * * * So far as the evidence shows, the court stated, it is an attempt to charge the company for the privilege of using the streets, which had been previously granted to it, and is, in effect, an effort on the part of the city to change the terms of its contract with the company, and to impose additional burdens on the company without its consent. We are of the opinion that this cannot be done * * *."

Of similar import is the case of Louisville Gas Company *vs.* Citizens' Gas Company, 115 U. S., 683.

In Louisiana it was held that:

> "A municipal ordinance granting to a particular company, authority to construct and maintain telephone lines on the streets, without any limitation as to time *and for consideration stipulated when accepted and acted on by the grantee by a compliance with all its conditions and the construction of a valuable and expensive plant, acquires thereby the features of a contract which the city cannot thereafter abolish or alter in its essential terms without the consent of the grantee;* * * *."
>
> City of New Orleans *vs.* Great So. T. & T. Co., 40 La. Ann., 41, 42.

In the case of Mayor and City Council of Baltimore *vs.* Nirdlinger *et al.*, decided December 13, 1917, by the Court of Appeals of Maryland, and reported in 131 Md., 600, 609, where an attempt was made by the City Council to revoke certain vault privileges, among other minor privileges of the same character, such revocation being primarily for the purpose of obtaining revenue, the court made clear in the concluding language of its opinion the principle now under consideration.

The court said:

> "When a city grows as Baltimore has there may be more necessity for preventing abutters and others from in any way encroaching upon the highways except in so far as may be necessary temporarily for building or like purposes, and it may be very desirable to avoid some of the encroachments in the

future, but in some of the cases before us, it is practically admitted that the board did not expect the parties to remove the alleged obstructions, but did expect them to pay, and in some instance repay, for them and continue them as they are, subject to such regulations and restrictions as may be imposed on them in the grants. It can make no difference to the public in the use of a street whether a vault, areaway, pole, sign, coal-hole, marquee or show window is paid for or is free, for it is just as much an obstruction in the one case as in the other. Indeed, it might well be contended that legislation authorizing a municipality to charge for such privileges, to some extent recognizes the necessity for them, as it is not to be presumed that the legislature would grant the power *exclusively* as a revenue measure, and when they do materially obstruct the public they ought not to be granted, unless there is some real necessity for them. But when they are granted and paid for, or were granted at a time when no money value to the city for them was taken into consideration but the authorities deemed it proper, possibly desirable for the city, to allow them, and the parties were induced to construct their buildings accordingly, instead of keeping back of the building line so they could keep them on their own ground, or to erect costly improvements, the successors in office of those who granted them ought not to be required, in the discharge of their duties as they understand them, to repudiate the action, or even *inaction* with knowledge of what was being done, of their predecessors in office if that must result in great injury or gross injustice to those who acted in good faith upon the grant, permission or consent of those in power at the time, unless there is no other proper course for them to pursue."

It is clear that the contracts and permits in the instant cases contemplated that while the same were revocable for *certain reasons* therein set forth, this revocability was limited and restricted by the terms of the permits to the proper *exercise of the police power*. It has not and cannot be contended that the rent sought to be collected in these cases can be recovered under any proper exercise of the police power. The authorizing act is a revenue measure only.

(c) *The deprivation of a vested property right by means of taxation is a physical taking in contemplation of law.*

> There is no "substantial distinction between the taking of private property by the actual physical invasion of it, and the deprivation of the owner's use of it by acts that amount to the destruction or impairment of that use."
>
> Dana *vs.* Rock Creek Railway Company, 7 App. D. C., 482, 496.

It is needless to say that as the city of Washington increased in size as well as population, and hotels, office buildings, and structures to be used as stores and housing for various commercial enterprises were erected, vaults under the sidewalks fronting these buildings became common, if not indispensable, and were a recognized adjunct to the edifices in connection with which they were built. The cost to the landowners of these subsidewalk excavations and improvements has run into many thousands of dollars, expended under the conditions and in reliance upon the terms of contracts with the District granting the right to build such vaults.

The imposition afterward of the annual charge directed in the act complained of imposes, we submit, such a burden upon the property rights of those who constructed the vaults, when it falls on them, as amounts to a physical taking of such rights by an impairment of the use of the vaults, acquired under the contracts mentioned.

II.

Section 7 of the act of September 1, 1916, impairs the obligation of the existing contracts of the respondents, and is therefore void as to them and all others in like situation if the act be construed to be retroactive.

(a) Congress in the exercise of its right of exclusive legislation for the District of Columbia has no greater power to impair the obligation of an existing contract than has a State, which is expressly inhibited from so doing by article 1, section 10, of the Constitution of the United States.

The power of Congress to legislate for the District, while made exclusive by article 1, section 8, paragraph 17, of the Constitution of the United States, is neither unlimited nor arbitrary.

> "The power of Congress to legislate for the District of Columbia in all matters proper for legislation, whether of a general political nature or of merely municipal character, is given by the Constitution of the United States; and the extent of that power we regard as well established by judicial authority. The power is exclusive, but it is not unlimited, nor is it arbitrary. There is no place in our governmental

> system for arbitrary or unlimited power. Our institutions are radically at variance with the theory of the existence of any such power anywhere in our country."
>
> Curry *vs.* District of Columbia, 14 App. D. C., 423, 438.

In the case of Loan Association *vs.* Topeka, 20 Wall., 655, 663, Mr. Justice Miller said:

> "The theory of our Governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined power. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D., or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."

In Curry *vs.* D. C., *supra*, the court, after quoting Mr. Justice Miller, said:

> "The power of Congress in the District of Columbia, as elsewhere throughout the Federal Union, is distinctly limited by all the express guaranties of individual right contained in the Federal Constitution. No more in the District of Columbia than anywhere

else within the United States, could the legislature of the Union pass a bill of attainder or an ex post facto law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches. All the general limitations imposed by the Constitution upon its authority are as applicable in the District of Columbia as in any other part of the United States. And not only are these express limitations applicable, but, in the language of Mr. Justice Miller, in the case just cited, all the 'implied limitations which grow out of the nature of all free governments' are equally applicable. The 'exclusive' power of legislation over this District which is vested in Congress by the Constitution, must be assumed to extend only to all lawful subjects of legislation; and invasions of those fundamental individual rights, which lie at the foundation of the social compact, and for the maintenance of which free governments exist, are not lawful subjects of legislation."

(b) Congress has no greater right in principle to impair the obligation of a contract than has a State.

The case most frequently cited in this jurisdiction upon this proposition of law is that of the District of Columbia *vs.* Capital Traction Co., 41 App. D. C., 115, 119, where Mr. Chief Justice Shepard, speaking for the court, used the following language:

"In the first place, the prohibition of laws impairing the obligations of contracts applies to the States, and not to the United States. The prohibitions to the United States are those of the 5th Amendment, that no person shall be deprived of property without due

process of law, and that private property shall not be taken for public use without just compensation."

With reference to the above case, two observations may be made:

1. The language quoted states what is conceded to be true, namely, that article 1, section 10, of the Constitution of the United States, relating to the "impairing the obligations of contracts" constitutes an express limitation only upon the States; but the case nowhere decides that this limitation as a matter of fundamental law, subject only to the proper exercise of the police power, is not also a limitation upon Congress.

2. This becomes more manifest when the facts upon which the opinion turned are analyzed. The court, however, held that Congress did not impair the obligation of an existing contract nor deprive the railway company of property without due compensation, even under the 5th Amendment, where Congress in granting the charter to the railway company expressly reserved the power to alter, amend or repeal it. The question of the existence of such reserved power therefore was the matter decided by the court's opinion.

It is not claimed in this brief that the inhibition in the Constitution relating to the "impairing of the obligation of a contract" imposes in terms a restriction upon congressional legislation. Our contention is that this restriction is imposed upon Congress by the fundamental principles of justice governing all legislative acts, as will appear more fully in the discussion of the following principle:

(c) *It does not necessarily follow that because a legislature is by express constitutional inhibition, forbidden to enact a law which it would otherwise have no power to enact, another legislature not so subject to constitutional limitation may legally enact such a law.*

In the dissenting opinion in what is known as the Sinking-Fund Cases, Union Pacific Railroad Company *vs.* United States, 99 U. S. 700, 736, the following language is used:

> "Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? Where is the power to annul vested rights? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligation of contracts applies only to State legislation. For such legislation the prohibition was necessary; for State legislatures have all legislative power which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress. As Mr. Hamilton said in the eighty-fourth number of the Federalist, 'Why declare that things shall not be done which there is no power to do?' Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the Government, or some department or officer thereof. I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the Government, or any grant of power to destroy vested rights. No power has been given to Congress to lessen the obligations of a con-

> tract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy."

The soundness of the foregoing proposition of law was not denied or in the slightest degree questioned, but on the contrary was assumed by the court in its majority opinion delivered by Mr. Chief Justice Waite (page 718), who said:

> "The United States cannot any more than a State interfere with private rights, *except for legitimate governmental purposes.* They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They can not legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. *The United States are as much bound by their contracts as are individuals.* If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

It thus appears from the above quotations, that both majority and minority opinions admitted and endorsed the

proposition that the United States acting through Congress, to the same extent as an individual, were bound by their contracts, and that no rights accruing thereunder could be impaired by any subsequent legislative act. The majority opinion held that Congress did not impair the obligation of its contracts with the railroad companies involved, but required some additional security in the way of a "sinking fund" from the companies, pursuant to and in accordance with the reserved powers of Congress; and while the minority opinion took a different view as to the effect of this legislation upon the contractual rights of the railroad companies involved, *yet there was no real divergence of opinion concerning the principle* to which allusion has just been made.

It will be observed that the facts underlying the instant cases disclose that the vested contract rights herein involved constitute a definite contractual relation between the respondents and the District of Columbia, which is an agent of the Congress of the United States in all matters of this character.

In Chicago, Burlington and Quincy Railroad Company *vs.* Chicago, 166 U. S., 226, 237, 238, the court, through Mr. Justice Harlan, said:

> "In the early case of Gardner *vs.* Newburgh, 2 Johns. Ch., 162, there being no provision in the Constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In Sinnickson *vs.* Johnson, 17 N. J. Law., 129, 145, it was held to be a settled principle of universal law,

> reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature 'can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its State constitution.' These cases are referred to with approval in Pumpelly *vs.* Green Bay Co., 13 Wall., 166, 178, and in Monongahela Nav. Co. *vs.* United States, 148 U. S., 312, 325, this court saying in the latter case: 'And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.' "

These principles have also been adopted by State courts whenever they have had occasion to consider them, as for instance in the case of The Territory *vs.* Reyburn, 1 Kan., 551, 557, the court saying:

> "It is argued that the provision of the Constitution of the United States, prohibiting the States from passing any law impairing the obligation of a contract, does not extend to or include the Congress of the United States, and hence, as they are not forbid-

den, they may pass such laws. This is an extreme error, and grows out of a misunderstanding of the organization and structure of our Government, and is predicated upon the erroneous idea that the general government is an original sovereignty. The separate States were original sovereignties, and may have had power as such, to impair the obligation of contracts until they formed the Constitution, by which they voluntarily prohibited themselves from the exercise of it, the existence of which right will be doubted, and the use of it was always deservedly condemned by all good and just men. The general government is not an original but a derivative sovereignty, upholding such powers only as are granted to it by the Constitution, or such as necessarily arise and follow from those specifically granted. The general government is the delegated agent, with the Constitution in its hand as its warrant of attorney, beyond whose provision it can not go in its action. The Constitution will be searched in vain to find a special grant of power to impair the obligation of a contract; and who shall justly say that this power, immoral in itself, and abhorrent to every man's sense of natural justice, is a necessary implication arising from the powers granted? We deny it."

The case of L. & N. Ry. *vs.* Mottley, 219 U. S., 467, is not adverse to the principle for which we here contend. The court there held that a contract made in 1871 to carry a passenger without charge in consideration of the relinquishment by the latter of his claim for damages, was not enforceable by the passenger after the passage by Congress of the Interstate Commerce Act of June 29, 1906, prohibiting a carrier from charging a different compensation from that

specified in its published tariffs; and that the statute meant that transportation should be paid for by all alike and for cash. This decision rested upon the following grounds:

1. The unrestricted right of Congress to regulate interstate and foreign commerce.

2. Such contracts are made with the knowledge of and subject to such paramount power in Congress (482).

3. The act in question was in execution of a public policy applicable to interstate transportation (477).

4. No obligation of a contract can extend to the defeat of legitimate governmental authority (482).

5. The framers of the Constitution never intended that this exercise by Congress of its constitutional power should ever be impaired by a contract previously made (482).

6. The liberty of an individual to make private contracts would result in the private regulation of interstate commerce and prevent Congress from the exercise of its constitutional right to regulate commerce among the States.

7. The interstate act of 1906 involves a change in the public laws in the *exercise of police powers*, to which all private contracts must yield (485).

8. If by the simple device of a contract *a police power* could not be exercised then all reforms might be prevented (487).

We respectfully submit, therefore, that the contracts of the respondents under which, for valuable consideration, they were granted the use of vault space free of charge for such occupancy could not legally be impaired by Congress and their property rights injured without their consent, unless in the exercise of the police power, which admittedly was not attempted to be exercised in the act complained of.

III.

Section 7 of the act of September 1, 1916, and a fortiori the orders of the Commissioners issued thereunder, are void for lack of uniformity and because they impose burdens upon some owners of property and not upon others similarly situated.

Attention is invited to the peculiar phraseology of the act under discussion. By it the Commissioners are authorized and directed to collect rent from all *users* of space, etc., "which said space is *occupied or used in connection with the business* of said *users*."

This provision and the orders enforcing it, work out thus: An owner of abutting property who before the passage of the act, expended large sums of money in constructing a vault and complied with the terms of his contract under which he acquired the right to use it, if *he so uses it in connection with his business*, must now pay an annual rental for such use. He is also required, at his expense, to change the vault and to repave the sidewalk, or relinquish it and remove costly fixtures therein, as the case may be, when the public needs so require.

Another abutting owner next door who built his vault under the same contract, conditions, burdens, and expense, escapes the rental charge because he does not use the vault *in connection with his business*, though he may *use* it for other legitimate purposes, or because he has leased his property and the *lessee* uses the vault. This owner may receive from his lessee a larger rent for his property than if there

were no vault. To that extent he uses the vault—*i. e.*, in the sense of leasing it.

In these illustrations the latter owner pays no rent; the former, with the same burdens and under the same contract as his fellow-owner, pays rent.

Again, a vault may be used in common by several. Some use it in connection with their business, some do not. All *use* it, yet for its *use* some pay and others do not.

In the instant cases, the owner of the property occupied by Andrews Paper Company, whose assignor constructed the vault, pays no rent; but Lisner, who owns and who constructed the vault used by him, is charged an annual rental. The rental required by the statute constitutes a penalty imposed solely on the user whose use is in connection with his business. Hence in some instances the law violates the provisions of the contract under which the vaults were built; in others it does not. It in effect places a burden upon the business use of vaults, leaving their use for other purposes free. In other words, the rent is based upon the character of use only. Again, if several use a vault in common for business purposes, who is to pay? Finally, the owners of dwellings are exempt from the operation of the act.

Discrimination of the character just pointed out, has been judicially condemned.

Thus, Congress undertook to require the removal of snow and ice from the sidewalks by tenants and occupants and owners of buildings, etc. The first paragraph of the act attempting to do this, reads:

> "Be it enacted * * * that it shall be the duty of every tenant or occupant of any lot or lots of

ground within the fire limits of the District of Columbia, improved by a house or building adjacent to any improved sidewalk, within the first four hours of daylight after the ceasing of any fall of snow, to cause said snow to be removed from the paved sidewalk adjacent to such lot or lots, etc."

Section 3 provided:

"That it shall be the duty of the owner or owners of every vacant or unimproved lot within the fire limits of the District of Columbia fronting or abutting upon a paved sidewalk, within the first four hours of daylight after the ceasing of any fall of snow, as set forth in paragraph 1 hereof, to cause such snow to be removed from the paved sidewalk in front of such lot or lots in the same manner, and to the same extent, and subject to the same penalty, as provided in said section, etc."

In the case of McGuire *vs.* District of Columbia, 24 App. D. C., 22, 29, 32, 33, construing these provisions, the court, after adverting to the beneficent purpose of this law—that of saving life and limb from accidents due to slippery sidewalks; and after remarking that the court should therefore look with favor upon the validity of such legislation, observed:

"Almost in the very first line we are confronted with an ambiguity that amounts almost to an absurdity. It is provided in the 1st section that 'every tenant or occupant' of improved property within a certain specified district shall cause the snow and ice to be removed from the adjoining sidewalk under a prescribed penalty. When there are a dozen or more

tenants or occupants of one improved piece of property, such, for example, as an apartment house, of which class of building we have now very many specimens in our city, are all the occupants of apartments therein liable for the performance of the prescribed duty, and punishable for failure to comply with the requirements of the act? And if not all are liable, is any one of them? An answer in the affirmative to either of these questions involves an absurdity; an answer in the negative leaves the statute without any provision whatever for the removal of snow and ice from the sidewalks in front of these apartment houses. For the owner is not by the statute required to do it, unless, perhaps, he happens, which would only be possible in rare cases, to be an occupant, also, of the premises; and certainly no employee about the premises would be a tenant or occupant in the eye of the law amenable to the performance of the duty required by the statute. In the case of improved property, not the owner, but the tenant or occupant, is required to do the work or have it done; and this, of course, is eminently right and proper if the work is to be done at all by the individual citizen."

The court says further:

"But probably the most glaring infirmity of this enactment is its sharp discrimination between the tenants and occupants of improved lots and the owners of vacant or unimproved lots. When it is remembered that the sole purpose to be subserved is the removal of snow and ice from the paved sidewalks of the District, and the duty of such removal is sought to be imposed upon individual citizens with reference to their occupation or ownership of adjoining prop-

erty, the utmost equality and uniformity must be observed in the imposition of the duty. It will not do to require one owner of property, by reason of his ownership, to perform a duty from which the owner of the adjoining property is relieved. *The owner of vacant property cannot be subjected to liability to which the owner of the adjoining improved property is not subjected,* when the thing to be done is based exclusively on the propinquity of such property, and can have no possible reference to the condition of such property as improved or unimproved. The necessity of the removal of snow and ice from the sidewalks is precisely the same in the one case as in the other. To punish the one owner, for failure of compliance with the act, by fine and imprisonment and an assessment upon his property, and to exempt the other from all duty and from liability for the same precise thing, is a species of inequality which is repugnant to the principles of natural justice; and the inequality is not obviated by the fact that the duty, which might otherwise be imposed upon the owner of improved property, is by the enactment shifted to the tenant or occupant. The fact remains that the owner of unimproved property is charged with a burden, by reason solely and exclusively of his ownership, with which the *owner of adjacent improved property is not charged,* notwithstanding that the burden has no relation whatever to the character of the property, whether improved or unimproved. For we are not to be understood as holding that there may not be difference of burden where the difference has a reasonable relation to the difference of character of the property."

We submit that the facts in the instant cases involving the disciminative operation of the vault-rent law as above illustrated, come within the reasoning of the court in the case cited. Other instances of similar inequality may be conceived, such as where vaults under the sidewalks adjacent to apartment houses might be used by the occupants thereof or by the owner, or by both. The same is true as to a large number of office buildings in the city of Washington, and indeed it is not unlikely that cases may arise where the fee to the sidewalk is in the owner of the abutting property and he might under the present law be charged rental for vaults of which he himself is the owner, for it has been judicially determined in this District that the title to lands embraced in the sidewalks in those sections north of Florida avenue and west of Rock creek is the owner of the abutting property.

IV.

Section 7 of the act of Congress in controversy is void for indefiniteness.

(*a*) *It will be observed that under the section involved "The Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users, etc. * * * " No basis whatsoever is provided for fixing the amount of the assessments. As to whether assessments are to be computed according to the linear feet, square feet or the area of space occupied, or upon the value of the abutting property or otherwise the act is silent.*

In Todd *vs.* Macfarland, 20 App. D. C., 176, 182, the court had before it an act of Congress providing for the wid-

ening and extending of certain streets. The act among other things provided that when the verdict of the jury was confirmed by the court, "the assessments shall become a lien upon the land assessed and shall be collected as special improvement taxes in the District of Columbia and payable in five equal instalments, with interest at the rate of 6 per cent per annum until paid." The court said it should be observed, that the assessments were to be collected as special improvement taxes were collected, and were made payable in five equal instalments without saying at what intervals of time such payments should be made, whether annually, semi-annually or monthly; and that it was manifest that the amounts of the assessments were not to be paid at once, and whatever time was intended to be given for payment was intended to be divided so as to make the payments equal in amount and at equal intervals of time commencing from the first of the five instalments; but the question of time was left in entire uncertainty and consequently by reason of the omission to specify the particular time when the instalment of assessment became due and payable the power of collection was defective, and the assessments, while the amounts had been ascertained and remained liens upon the lands, could not be collected by the District authorities. The court suggested that such defective means of collection might be cured and rendered effective by a subsequent Congress.

It is observed by the court in the above case that because the damages for the land taken had already been paid to the parties entitled thereto as authorized by the act there would be no justice in avoiding entirely the assessments for benefits.

A similar question arose in the case of Buchanan *vs.* Macfarland, 31 App. D. C., 6, and the court based its decision

upon the reasoning in the case of Todd *vs.* Macfarland, above cited.

In Lockwood *vs.* District of Columbia, 24 App. D. C., 569, 571, the interpretation of certain portions of the personal tax law was in question. The court, speaking through Mr. Justice Shepard, observed:

> "The established rule of the courts is that all statutes imposing restrictions upon business or the common occupations of the people, or levying a tax upon them, are to be construed strictly.
>
> "As was said by Chief Justice Alvey in delivering the opinion of this court in Washington Electric Vehicle Transp. Co. *vs.* District of Columbia, 19 App. D. C., 462, 470; 'All the authorities agree in maintaining that all charges upon the citizen must be imposed by clear and unambiguous language, because, as it is said, they operate as penalties. In a case of doubt that construction most beneficial to the citizen must be adopted.' Here, as we have seen, the penalty for pursuing this occupation without the payment of a considerable license tax is a severe one, and it is eminently just, therefore, that the citizen should be reasonably well informed, *by the language of the statute itself,* of his obligation to pay money demanded of him, the failure to pay which, if he errs in its construction, may subject him to that penalty."

(*b*) *Counsel for respondents contend that the infirmity discussed under this head can not be cured by any act on the part of the Commissioners of the District of Columbia, as no sufficient authority for so doing is vested in them under this or under any other act so far as counsel are able to ascertain. The Commissioners are creatures of statute and possess no im-*

plied powers. The mere fact that thus far the rental assessed is fair, does not cure the defect in the act complained of. Future orders of the Commissioners assessing larger rentals would be likely to involve those concerned in yearly litigation to obtain judicial determination of the fairness of the rental charge for a particular year, or series of years.

In Fay *vs.* Macfarland, 32 App. D. C., 294, 299, wherein certain statutes authorizing the taking of private property for public use were considered, the court in its opinion, on page 299, states:

> "Statutes like the present, authorizing the taking of private property for public use, are to be strictly construed. The Commissioners are creatures of statute. They possess no implied powers. Their authority to act must be gathered from the express terms of the law granting it. Hence, in any attempt to act under a statute granting authority, they must comply literally with its requirements."

It is conceded that Congress may confer upon the Commissioners of the District of Columbia, subject to certain limitations, the power to levy taxes in a given case, just as a State legislature may create a municipality within its territorial limits and clothe it with certain powers of taxation. But it is denied that Congress may by the general authority contained in the appropriation act of September 1, 1916, vest the Commissioners of the District with absolute and arbitrary power both to assess and to collect rent for vault space, without in any way limiting the Commissioners with respect to the amount, the terms or the manner of the assess-

ment and collection thereof, or otherwise defining the extent of their powers.

V.

Section 7 of the act of September 1, 1916, if construed as retroactive, is an implied repeal of prior regulations of the Commissioners made pursuant to and having the force of law. An implied repeal is not looked upon with favor by the courts.

Repeals by implication are not favored and statutes will not be construed to so operate, unless such intention is clearly expressed by the legislature.

Arthur *vs.* Homer, 96 U. S., 137.
Clay County *vs.* Savings Society, 104 U. S., 579.
Chicago, M. & S. P. R. Co. *vs.* U. S., 127 U. S., 406.

There must be positive repugnancy between the new law and the old to work a repeal of the former by implication; and even then the old law is repealed only to the extent of such repugnancy. If any part of the earlier act can stand it will not be repealed (Wood *vs.* U. S., 16 Pet., 342).

It will not be presumed that a legislature by the enactment of subsequent statutes intended to repeal an earlier one unless it has done so by express terms (36 Cyc., 1150, and cases cited). Among these is the leading case of Lybbe *vs.* Hart, 52 L. T. Rep. (N. S.), 634, where it was held that when a statute is not expressly repealed, the burden is on those who assert that there is an implied repeal to show that the statutes can not consistently stand together. So far as reasonably possible several statutes, although seemingly in

conflict with each other, should be harmonized and force and effect given to each.

In Kansas Pacific Railway Co. *vs.* Commissioners of Wyandotte County, 16 Kan., 587, it was held that where there is no way of reconciling conflicting clauses of a statute, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with other legislation on the same subject.

It will be observed that we are under the necessity here of harmonizing the act of September 1, 1916, with prior building regulations, but these have the force of an act of Congress (Berry *vs.* D. C., 32 App. D. C., 96) and provide that "no charge will be made for the occupancy of public space by vaults."

VI.

If section 7 of the act of September 1, 1916, is retrospective and retroactive in its character, it is inoperative as to the respondents.

(*a*) *The act of September 1, 1916, if it is to be given the construction contended for by the petitioner, is retroactive.*

It is a rule of statutory construction that all statutes are to be construed as having a prospective operation, unless the purpose and intention of the legislature to give them a retrospective effect "is manifest beyond reasonable question" (Shreveport *vs.* Cole, 129 U. S., 36, 43).

This principle was thus expressed in De Ferranti *vs.* Lyndmark, 30 App. D. C., 417, 422:

> "It is a general rule of statutory construction that, in the absence of language in a statute clearly expressing an intention to the contrary, statutes will be construed prospectively."

Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them (U. S. *vs.* Heth, 3 Cranch, 399).

See also Murray *vs.* Gibson, 15 How., 421; Twenty Per Cent cases, 20 Wall., 179.

The rule that statutes are not to be construed retrospectively, unless such construction is plainly intended by the legislature, applies with peculiar force to those statutes, the retrospective operation of which impairs or destroys a vested right (36 Cyc., 1210; Plumb *vs.* Sawyer, 21 Conn., 351; Spitley *vs.* Frost, 15 Fed., 299; 5 McCrary, 43, reversed on another ground in 121 U. S., 552).

In Aurora and Laughery Turnpike Company *vs.* Holthouse, 7 Ind., 59, 61, followed in Bowen *vs.* Striker, 100 Ind., 45, the court held that "statutes are to be construed prospectively, unless the intention to give retrospective operation is clearly expressed, *and not even then, if by such a construction the act would divest vested rights.*"

The Court of Appeals in the instant cases held that the act in controversy is not retroactive; that the intention of Congress in enacting section 7 was to preserve, not to destroy, vested interests; to recognize, and not to abridge the rights of the respondents. We submit that in this the Court of Appeals was right and followed the judicial principles established by the cases above cited. The contrary construction, by which a burden would be imposed annually upon those who have kept faith with the District, paid all that was de-

manded for their privileges, and expended large sums of money to enjoy them, is unnecessary. To hold that the act is prospective only in its operation, if it be valid at all, is to permit the exaction, by way of rental, of compensation for the use of vaults hereafter constructed under contracts embodying the rental provision; leaving in *statu quo* those who have already, under a solemn agreement, paid for such use *all* that was required, relying on the terms of such agreement that what had been required *was* all.

For all the reasons hereinabove set forth, we respectfully submit that the judgments of the Court of Appeals should be affirmed.

Petitioner's Brief.

1. Counsel for petitioner apparently bases his entire argument upon the proposition that no contractual relation existed between the District of Columbia and the respondents. If he is wrong in his contention, then his whole argument fails. That respondents and the District did contract with reference to the vaults in question has been already argued and, we think, demonstrated. Nothing further need be said on this point except to invite attention to the language used in the permits and regulations relating to vaults, such as "It is further agreed, that," etc., in the permit; and in the regulations that the application for a permit must be accompanied by a "written agreement" signed by the owner, etc., "contracting to release and relinquish" the vault space and remove fixtures, etc., when such space should be needed for public uses (R., pp. 6, 7).

2. The question is also raised by petitioner's counsel, that the Commissioners had no power to make the contracts

claimed by the respondents. This question is disposed of by the fact that the building regulations have been determined to have the force of law, having been authorized by Congress (Berry *vs.* D. C., 32 App. D. C., 96), and by the act of Congress of March 3, 1891 (26 Stat., p. 868), which ratified the action of the Commissioners in theretofore granting permits for extensions beyond the building line and authorized them, with the concurrence of the Secretary of War, to grant future permits (R., p. 5). (The Secretary's concurrence was later dispensed with.)

3. To the argument made that no franchise, license, or easement of a perpetual nature as to vault space could be or was intended to be granted, it is a sufficient answer to observe that owners of properties, such as hotels, large stores, office buildings, and banking-houses, have not for a hundred years built, and do not build and equip for commercial purposes vault space beneath sidewalks at large expense, and as constructive parts of such edifices, with the expectation and understanding that the vaults are temporary, removable at the mere whim of the Commissioners, and not to be considered as of equal permanence with the buildings to which they are adjunct, except in so far as such vaults are removable for public purposes. The risk of such removal they are willing to take because remote and of rare occurrence.

An illustration of this is the occupancy by respondent Saks & Company for over 30 years of the vaults adjacent to their leased property.

The cases cited in petitioner's brief do not seem in point, as they deal either with the attempted grant of *exclusive franchises* in the streets of a city, or with rights claimed in

contravention to those of the public. No such situation is presented in the cases at bar.

One State case, however, is quoted from at some length, concerning which a few words may be said. It is the case of Tacoma Safety Dep. Co. *vs.* Chicago, 247 Ill., 192; 31 L. R. A. (N. S.), 868. The enforcement of an ordinance requiring rental for vault space under a sidewalk, the fee of which was in the city of Chicago, was sought to be enjoined on the ground that because the city granted a permit to the company to construct its building according to plans which included subways beneath the sidewalks, the city was estopped to deny the company's right to use the subways free of charge. The court held that the mere granting of the permit to erect the whole building, including the space beneath the sidewalk, the city having a right to regulate the construction of the building, did not constitute a contract nor prevent the city from compelling payment of compensation for the use of its property. The court, however, distinguished the cases theretofore decided by it, recognizing the power of the city to contract with respect to subsidewalk space, and the binding force of such contracts upon the city. The case therefore is not applicable to the facts presented by the records now before this court.

4. The petitioner's brief concludes with the naive suggestion that the "licenses" for the vaults used by respondents might be revoked, and new licenses issued carrying rentals under the act of September 1, 1916, and such proceedings "concededly" would be regular, and, of course, a like action might be taken with respect to *all* vaults built prior to the date of the act.

We do not concede the regularity of any such procedure, but, on the contrary, invite attention to the fact that *only* the need of the vault spaces for *public uses* would justify the revocation of the many vault permits issued during a period of over one hundred years preceding the passage of the Vault Rent act; a fact not only embodied in the permits and contracts under which such vaults were built, but recognized by the uniform conduct of the municipality for more than a century.

In conclusion, we submit that the vaults in question were constructed under contracts with the District, and that these contracts were necessarily and in express terms subject to the paramount rights of the public and the exercise by the Congress of the police power inherent in its exclusive legislative jurisdiction over the District; but that such contracts were *not* subject to any reserved power in Congress to impair or change at will the obligations of the District contained therein, especially as to the charge stipulated for the use of the vaults, such charge having been fixed by the District itself. In other words, having the power to exact any compensation it desired, the District elected by its contracts to make no charge other than the permit fees, and thereby exhausted its right to exact compensation as to those vaults which were the subject of such contracts.

Respectfully submitted,

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